2015 IL App (4th) 130730-U

NO. 4-13-0730

FILED
April 28, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

| | | |
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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from |
| Plaintiff-Appellee, | ) | Circuit Court of |
| v. | ) | Champaign County |
| DORIAN D. WILLS, | ) | No. 12CF136 |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | Thomas J. Difanis, |
| | ) | Judge Presiding. |

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justices Knecht and Harris concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court erred in dismissing defendant's postconviction petition at the first stage where defendant presented the gist of an ineffective-assistance-of-counsel claim.

¶ 2 In October 2012, defendant, Dorian D. Wills, entered into a partially negotiated plea to aggravated kidnapping (720 ILCS 5/10-2(a)(3) (West 2010)), a Class X felony (720 ILCS 5/10-2(b) (West 2010)). In exchange, the State agreed to dismiss a robbery count and recommend a sentencing cap of 20 years' imprisonment. Thereafter, the trial court accepted defendant's plea and imposed a 20-year prison sentence.

¶ 3 In July 2013, defendant filed a *pro se* postconviction petition, alleging his trial counsel was ineffective for failing to file a motion to reduce sentence and/or a notice of appeal despite defendant's specific request to do so immediately following sentencing.

¶ 4 In August 2013, the trial court summarily dismissed defendant's petition as frivolous and patently without merit.

¶ 5 Defendant appeals the trial court's first-stage dismissal of his petition. We reverse and remand for second-stage proceedings.

¶ 6 I. BACKGROUND

¶ 7 On January 27, 2012, the State charged defendant with aggravated kidnapping (720 ILCS 5/10-2(a)(3) (West 2010)) (count I) and robbery (720 ILCS 5/18-1 (West 2010)) (count II). Defendant was initially represented by appointed counsel. However, on March 9, 2012, private counsel entered his appearance to represent defendant and the public defender was discharged.

¶ 8 On October 3, 2012, the State filed a notice of intent to seek an extended-term sentence of up to 60 years in prison, citing the fact the offense was accompanied by exceptionally brutal or heinous behavior.

¶ 9 On October 22, 2012, defendant pleaded guilty to one count of aggravated kidnapping in exchange for the State's agreement to dismiss the robbery count and recommend a sentencing cap of 20 years' imprisonment. The State offered the following factual basis for the plea:

> "[O]n October 21 of 2011, [the victim] was walking in the campus area in Champaign-Urbana when *** four to five men forced him into a minivan and beat him repeatedly. The victim lost consciousness. His clothing was taken. He suffered facial broken bones. He suffered multiple abrasions about his entire body and was hospitalized for some time.

These defendants were tied to this as the co-defendant Anthony Davis took the victim's phone during the kidnapping and sold it to Eric Davis, who would testify and who identified Anthony Davis in a lineup.

Anthony Davis gave a full statement, as did Emily Crowder and Kenson Reed, who were present inside of the van and who would also testify that this defendant[,] as well as Anthony Davis and Ralph Gray[,] all took part in beating this victim in different locations in Champaign County."

¶ 10 During the December 10, 2012, sentencing hearing, defendant's trial counsel argued the following:

"It doesn't take much evidence or argument to get to the 20 years in this case. The victim impact statement was one of the most horrendous things I have ever read.

In analyzing how I respond to that as his attorney, I looked for what could be mitigation. I think there are three things.

First, as [the prosecutor] mentioned, he is young. He has the potential for rehabilitation.

The second thing is he was quick to admit his guilt, both to the police and gave them a full confession.

And then he did plead guilty. [Defendant] didn't make [the victim] come in here and recount this to a room full of strangers.

> And last, it's a small point but something to mention [(alluding to the fact the victim was from Australia)], it's expensive to fly from Australia to here and the county was saved that expense.
>
> So, I mean, if we are grasping at straws, I want you to have them all. Thank you."

¶ 11 The trial court then sentenced defendant to 20 years in prison. The court admonished defendant prior to taking an appeal, he had to file, "within 30 days, a written motion asking to have the judgment vacated and for leave to withdraw [his] guilty plea."

¶ 12 In an April 12, 2013, letter to the circuit clerk, defendant requested a copy of the docket sheet or other records showing the date his counsel filed the "motion for reduction of sentence and/or notice of appeal."

¶ 13 On May 17, 2013, after learning his trial counsel had not filed any postplea motions, defendant filed a motion for leave to file a late notice of appeal, citing his trial counsel's ineffective assistance for failing to file a motion to reduce sentence or a notice of appeal despite defendant's request he do so.

¶ 14 On May 29, 2013, the trial court, noting defendant had not filed a motion to withdraw his guilty plea, which it observed was required prior to taking an appeal, nonetheless directed the circuit clerk to file defendant's notice of appeal. This court granted defendant leave to appeal and the office of the State Appellate Defender (OSAD) was appointed to represent him.

¶ 15 The record shows on June 27, 2013, OSAD filed a motion to dismiss the appeal, arguing the appellate court lacked jurisdiction because defendant had failed to comply with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006)), *i.e.*, defendant did not file a motion to

withdraw his guilty plea within 30 days of sentencing. According to OSAD, it had advised defendant postconviction procedures would still be available to him. As a result, defendant filed a motion to voluntarily dismiss his direct appeal, which we granted.

¶ 16 On July 26, 2013, defendant filed a *pro se* postconviction petition, alleging his trial counsel was ineffective where he had failed to file a motion to reduce the sentence and/or a notice of appeal despite defendant's specific request to do so following the trial court's admonishments about his appeal rights on the day of sentencing. According to defendant's petition and accompanying affidavit, his trial counsel replied to him by saying "it would be a waste of time and money to [file a] motion for reduction of sentence and appeal." Defendant alleged he was prejudiced by being deprived of his right to appeal.

¶ 17 On August 2, 2013, the trial court summarily dismissed defendant's postconviction petition. In its written order, the court stated the following:

> "The defendant's [ineffective-assistance-of-counsel] claim centers around his negotiated plea of guilty to the charge of [a]ggravated [k]idnaping. The defendant was properly admonished that before he could appeal the decision of the Court he must first file a motion to withdraw his guilty plea. Instead, the defendant requested his attorney to file a motion for reduction of sentence. Such a motion, had it been filed, would not have been considered by the Court.
>
> The defendant claims his attorney was ineffective for not filing a petition that would not have been considered by the Court.

Therefore, the defendant's petition is frivolous, patently without merit[,] and is ordered dismissed."

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendant argues the trial court erred in summarily dismissing his postconviction petition at the first stage as frivolous and patently without merit. Defendant contends his petition set forth an arguable claim his trial counsel provided ineffective assistance in disregarding his request to file a postplea motion, which deprived defendant of his right to appeal. We agree.

¶ 21 A. Standard of Review

¶ 22 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)) provides a means for a defendant to challenge a conviction or sentence based on an alleged violation of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). At the first stage of postconviction review, the trial court independently reviews the petition to determine whether it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012). A petitioner need present only a limited amount of detail and is not required to include legal argument or citation to legal authority. *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001). The first stage in the postconviction proceedings allows the trial court "to act strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit." *People v. Rivera*, 198 Ill. 2d 364, 373, 763 N.E.2d 306, 311 (2001). The allegations of the petition, taken as true and liberally construed, need only present the gist of a constitutional claim. *People v.*

*Harris*, 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007). This standard presents a low threshold (*People v. Jones*, 211 Ill. 2d 140, 144, 809 N.E.2d 1233, 1236 (2004)), requiring only that the petitioner plead sufficient facts to assert an arguably constitutional claim (*People v. Hodges*, 234 Ill. 2d 1, 9, 912 N.E.2d 1204, 1208 (2009)).

¶ 23 Our supreme court has explained a trial court may summarily dismiss a *pro se* postconviction petition "as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 11-12, 912 N.E.2d at 1209. A petition lacks an arguable legal basis when it is based on an indisputably meritless legal theory, such as one the record completely contradicts. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A petition lacks an arguable factual basis when it is based on a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional. *Hodges*, 234 Ill. 2d at 16-17, 912 N.E.2d at 1212. "The summary dismissal of a postconviction petition is reviewed *de novo*." *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010).

¶ 24 B. Ineffective-Assistance Claim

¶ 25 In this case, defendant argues his trial counsel provided ineffective assistance. We review ineffective-assistance-of-counsel claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999). Under this standard, the defendant must show counsel's performance was deficient and prejudice resulted from the deficient performance. *People v. Houston*, 226 Ill. 2d 135, 143, 874 N.E.2d 23, 29 (2007). "At the first stage of proceedings under the Act, a petition alleging ineffective assistance of counsel may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable

that the defendant was prejudiced." *People v. Petrenko*, 237 Ill. 2d 490, 497, 931 N.E.2d 1198, 1203 (2010).

¶ 26 1. *Deficiency Prong*

¶ 27 To satisfy the deficiency prong of *Strickland*, the defendant must demonstrate counsel made errors so serious and counsel's performance was so deficient that counsel was not functioning as "counsel" guaranteed by the sixth amendment (U.S. Const., amend. VI). *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163.

¶ 28 In *Edwards*, the defendant specifically alleged in his petition he asked his trial counsel to file an appeal after he pleaded guilty pursuant to a negotiated plea, but his attorney did not do so. *Edwards*, 197 Ill. 2d at 242, 757 N .E.2d at 444. The defendant's postconviction petition stated the following:

> " 'I requested [my attorney] file an appeal, after the [trial court] explained to me that I could do so. [My attorney] stated in regard to the appeal, [']On what grounds?['] [My attorney] had taken it or decided for herself not to file an appeal, in spite of my numerous requests to.' " *Edwards*, 197 Ill. 2d at 242, 757 N.E.2d at 444.

¶ 29 The trial court found the defendant's petition did not include any recognized issues that could have been raised in a motion to withdraw the guilty plea. *Edwards*, 197 Ill. 2d at 242, 757 N.E.2d at 444. The trial court reasoned to allege ineffective assistance of counsel the defendant had to " 'show prejudice. In the least, [this] would apparently mean that the [defendant] would have to show grounds for a motion to withdraw a guilty plea.' " *Edwards*, 197 Ill. 2d at 242, 757 N.E.2d at 444. As a result, the trial court dismissed the petition as frivolous or

patently without merit. *Edwards*, 197 Ill. 2d at 242, 757 N.E.2d at 444. The appellate court affirmed and the defendant appealed to the supreme court. *Edwards*, 197 Ill. 2d at 243, 757 N.E.2d at 444-45.

¶ 30 In reversing, the supreme court explained "[t]he 'gist' standard [was] 'a low threshold' [citation]" and to allege the " 'gist' of a constitutional claim," a defendant " 'need[ed] only [to] present a limited amount of detail' [citation] and hence [did not] need *** [to] set forth the claim in its entirety." *Edwards*, 197 Ill. 2d at 244, 757 N.E.2d at 445 (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996)). According to the supreme court, the "gist" of a claim was all the Act required at the first stage, and the defendant had stated the "gist" by alleging his attorney's substandard performance in failing to file an appeal. *Edwards*, 197 Ill. 2d at 253, 757 N.E.2d at 450. The supreme court held summary dismissal of the petition was premature given that factual allegation. It concluded the petition was not "so completely lacking in substance that it [was] frivolous or patently without merit." *Edwards*, 197 Ill. 2d at 257, 757 N.E.2d at 453.

¶ 31 In this case, the trial court focused on defendant's allegation trial counsel ignored his request to file a motion for a reduction of his sentence. The court stated it would have denied such a motion had it been filed. However, as stated in defendant's petition and accompanying affidavit, defendant asked his counsel to file a motion to reconsider his sentence *and/or* a notice of appeal. Defendant alleged his counsel responded "it would be a waste of time and money to [file a] motion for reduction of sentence and appeal." Defendant's letter to the circuit clerk's office asking when the notice of appeal was filed supports a reasonable inference defendant expected an appeal would be filed. See *People v. Knight*, 405 Ill. App. 3d 461, 471, 937 N.E.2d

789, 797 (2010) ("all reasonable inferences should be taken in favor of finding that the petition should proceed to an evidentiary hearing"). Defendant's petition also states his trial counsel "abandoned" his request to file an appeal. Thus, like the defendant's petition in *Edwards*, defendant's petition in this case alleged his counsel ignored his request to file an appeal.

¶ 32 It is well-settled the decision whether to appeal is the defendant's alone. See *People v. Campbell*, 208 Ill. 2d 203, 210, 802 N.E.2d 1205, 1209 (2003) (taking an appeal is a decision on which trial counsel should consult, but on which the defendant's choice is binding). Counsel's alleged failure to file a motion to withdraw defendant's guilty plea as a first step toward perfecting his requested appeal arguably prevented appellate review. "[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000).

¶ 33 The State points out defendant's postconviction petition does not mention a desire to withdraw his guilty plea. We recognize defendant would have had to file a motion to withdraw his guilty plea as a first step toward perfecting his appeal. See Ill. S. Ct. R. 604(d) (eff. July. 1, 2006) ("[n]o appeal shall be taken upon a negotiated plea of guilty challenging the sentence as excessive unless the defendant, within 30 days of the imposition of sentence, files a motion to withdraw the plea of guilty and vacate the judgment").

¶ 34 However, the trial court admonished defendant of the need to file a motion to withdraw his plea prior to taking an appeal. Defendant's petition alleges his request for an appeal followed the trial court's admonishments about his appeal rights on the day of sentencing. As a result, it is not unreasonable to presume defendant understood his request to appeal included a request to file a motion to withdraw his guilty plea. See *Edwards*, 197 Ill. 2d at 245, 757 N.E.2d

at 446 ("[w]hile in a given case the *pro se* defendant may be aware of all the facts pertaining to his claim, he will, in all likelihood, be unaware of the precise legal basis for his claim or all the legal elements of that claim"). Further, the gist standard is a low threshold which can be satisfied by presenting only a limited amount of detail instead of setting forth the claim in its entirety. *People v. Williams*, 364 Ill. App. 3d 1017, 1022, 848 N.E.2d 254, 258 (2006); *Brown*, 236 Ill. 2d at 184, 923 N.E.2d at 754 (legal argument or citation to legal authority is not required).

¶ 35 The State also argues counsel's performance was not deficient because his response to defendant's request, "it would be a waste of time and money," shows his attorney consulted with defendant regarding his request and told him why it was not advisable. According to the State, "[d]efendant's counsel did not disregard defendant's specific instructions and was not inattentive to his desire to file a motion to reconsider sentence and appeal."

¶ 36 However, despite the State's argument to the contrary, here, as in *Edwards*, there is nothing in the record indicating defendant's counsel reviewed the plea proceedings for error before telling defendant it would be a waste of time to pursue an appeal. *Edwards*, 197 Ill. 2d at 253-54, 757 N.E.2d at 451; see also *Smith v. Robbins*, 528 U.S. 259, 278 n.10 (2000) (a defendant has the right to have an attorney evaluate his case and attempt to discern nonfrivolous arguments before deciding not to pursue an appeal). In *Edwards*, the supreme court stated:

> "Because there is nothing of record to establish that defendant's trial counsel ever reviewed the plea proceedings for error before deciding not to pursue an appeal, and because it is contrary to the holdings of *Flores-Ortega* and *Rodriquez* [*v. United States*, 395 U.S. 327 (1969),] under these circumstances to require defendant,

> who is proceeding *pro se*, to provide grounds for withdrawing his guilty plea and his appeal, we hold that the circuit court erred in dismissing defendant's petition at the first stage of the post-conviction proceedings. Whether, in the circumstances of this case, defense counsel's decision not to file a motion to withdraw the guilty plea constitutes ineffective assistance of counsel requires the appointment of an attorney who will be able to consult with defendant regarding his claim and explore in more detail the factual and legal ramifications of defendant's claim. At this juncture, it would be inappropriate to conclude that defendant's claim of ineffective assistance of counsel is so completely lacking in substance that it is frivolous or patently without merit." *Edwards*, 197 Ill. 2d at 257, 757 N.E.2d at 452-53.

¶ 37 Under the circumstances presented in this case, defendant's allegation counsel's performance was arguably deficient satisfies the gist standard as it relates to the first prong of the *Strickland* analysis.

¶ 38 2. *Prejudice Prong*

¶ 39 Ordinarily, to satisfy the second prong of the *Strickland* analysis, the defendant must prove a reasonable probability exists, but for counsel's unprofessional errors, the proceeding's result would have been different. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163-64. However, a defendant is not required to demonstrate prejudice where, as here, his trial counsel fails to initiate an appeal upon request, as prejudice is presumed. *Edwards*, 197 Ill. 2d at 251-52,

757 N.E.2d at 449-50 (citing *Flores-Ortega*, 528 U.S. at 483). Thus, defendant was not required to demonstrate the trial court would have granted a motion to withdraw his guilty plea or that his appeal would have had merit. Instead, all defendant is required to show at the first stage of postconviction proceedings is he requested his attorney file an appeal and counsel failed to take the necessary steps toward doing so. *Edwards*, 197 Ill. 2d 253-54, 757 N.E.2d at 450-51.

¶ 40 Thus, we cannot say defendant's postconviction petition failed to present the gist of a constitutional claim. Accordingly, we reverse the trial court's order dismissing defendant's petition and remand for second-stage proceedings, including the appointment of counsel if requested by defendant. See 725 ILCS 5/122-2.1(b) (West 2012). We note our findings herein are for the limited purpose of determining whether defendant satisfied the gist standard sufficient to survive a first-stage dismissal. As such, we express no opinion as to whether defendant's claim will ultimately support a substantial showing of a constitutional violation sufficient to merit an evidentiary hearing. That is a second-stage issue.

¶ 41 III. CONCLUSION

¶ 42 For the reasons stated, we reverse the trial court's first-stage dismissal of defendant's postconviction petition and remand for second-stage proceedings.

¶ 43 Reversed and remanded.